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No. 91-1212

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PORTER H. MITCHELL,

Petitioner,

v.

MOBIL OIL CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION

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February 25, 1992

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Tenth Circuit permissibly exercised its discretion in holding that petitioner – who has now filed his second certiorari petition – is barred by the law of the case from seeking to relitigate issues decided against him in his first appeal, because (*i*) he waived whatever right he might have had to a new trial and (*ii*) the decision in the first appeal did not involve any non-waivable "jurisdictional" issues.

LIST OF PARTIES

Respondents Mobil Oil Corporation, *et al.*, adopt the list of parties in petitioner's petition, but note that the Trustees of the Retirement Plan of Mobil Oil Corporation were never served with process.

Mobil Oil Corporation's parent is Mobil Corporation, a publicly held corporation.

A list of Mobil Oil Corporation's non-wholly owned subsidiaries, required by Sup. Ct. R. 29.1, is included in the supplemental appendix to this opposition [SA-30].[1]

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[1] "SA-__" refers to the supplemental appendix following this opposition. "A-__" refers to the appendix to petitioner's petition.

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RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION

Porter H. Mitchell petitions for review of an unpublished "Order and Judgment" based on the Tenth Circuit's straightforward application of the law of the case and on Mr. Mitchell's repeated waivers of the claims he now seeks to present.

This is Mr. Mitchell's second certiorari petition. It seeks to raise an issue he deliberately chose not to include in his first one, which was denied. 111 S. Ct. 252 (1990).

The Tenth Circuit was correct on the law and the facts in applying the law of the case. The court expressly held that it "need not decide" – and it did not decide – the issue Mr. Mitchell would present to this Court. [A-3.]

COUNTERSTATEMENT OF THE CASE

The Tenth Circuit's unpublished Order and Judgment ("*Mitchell II*") sets out the relevant procedural history and demonstrates why that court's ruling was correct. *See also Mitchell v. Mobil Oil Corp.*, 896 F.2d 463 (10th Cir.), *cert. denied*, 111 S. Ct. 252 (1990) ("*Mitchell I*") (SA-1) (decision in first appeal).

The Court of Appeals did not address Mitchell's representations to this Court in his first petition for certiorari. We do so briefly.

After he had filed several briefs and papers seeking to overturn or modify *Mitchell I*'s reversal of his jury verdict, Mitchell asked Justice White for an extension of time to file his first certiorari petition. His July 2, 1990 motion stated that he needed more time because he "intend[ed] to present [his new-trial] issue to this Court" if the Tenth Circuit denied his motion. [SA-20.]

That issue is the same one he now seeks to present to this Court.

An extension, Mitchell said, would "avoid the necessity of [his] filing two separate petitions for certiorari at two different times, thereby needlessly consuming the resources of this Court and the parties." [SA-20.]

That same day, Mitchell asked the Tenth Circuit to extend its stay of mandate pending the delayed filing of his certiorari petition. As he put it, his pending motion to clarify or amend the judgment in *Mitchell I*

> . . . presents special and important reasons for issuance of a writ of certiorari and should this Court declare that the district court is ordered to enter judgment for Mobil on the ADEA claim on remand despite Mobil's failure to move for judgment notwithstanding the verdict, Mitchell desires to challenge that ruling as well in his petition for certiorari. [SA-22.]

Justice White granted Mitchell's motion for more time, and the Tenth Circuit extended the stay of mandate.

But Mitchell's first certiorari petition did not raise the issue on which he now seeks review – and on which the Tenth Circuit held he was bound by the law of the case. If the word "waiver" has any meaning, Mr. Mitchell has repeatedly waived this claim.

REASONS FOR DENYING THE WRIT

I

The Tenth Circuit Correctly Held that Mitchell's Knowing and Intentional Failure to Raise the Issue He Now Presents Triggers the Law of the Case and Precludes Further Litigation.

Mr. Mitchell concedes [at 3] that (a) he did not assert his new-trial arguments until after the conclusion of the first appeal (including rehearing) and (b) he did not raise the Tenth Circuit's denial of his motion to clarify in his first certiorari petition.

He therefore failed to preserve for review the sole question he now presents in his second certiorari petition. His waivers also amply justify the Tenth Circuit's application of law of the case in *Mitchell II*. E.g., *Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 441 (1986) (prior judgments never challenged on certiorari are not open to review in subsequent petition); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 432 (1976) (validity of original judgment not before Court because it had not been appealed); *Northwestern Ind. Tel. Co. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 757 (1990) ("It is elementary that where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand."); *see also Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981), *cert. denied*, 459 U.S. 828 (1982) ("It would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost.").

A. Mitchell Repeatedly Waived His New-Trial Claim.

1. Mitchell's First Waiver

Mobil's opening brief in the first appeal (*Mitchell I*) challenged the sufficiency of the evidence and asked the Tenth Circuit to "reverse and remand with instructions to enter judgment in Mobil's favor." [Mobil's 3/30/89 Br. at 49.]

Mr. Mitchell therefore knew that Mobil was asking for (*i*) a determination that his evidence was insufficient and (*ii*) entry of judgment in Mobil's favor. He also knew that Mobil had not asked the district court to enter judgment notwithstanding the verdict.

But Mitchell did not claim — in his answering brief, in his reply brief as cross-appellant, or at oral argument — that he could provide additional evidence that might warrant a new trial if the judgment were reversed. Nor did he claim that the Tenth Circuit was "without power" or "jurisdiction" to direct the entry of judgment for Mobil.

2. Mitchell's Second Waiver

The Tenth Circuit held in *Mitchell I* that "Mobil did not violate the ADEA," and it "reverse[d] the trial court's denial of Mobil's motion for a directed verdict." [SA-15.] The court also declined to review Mitchell's cross-appeal on damages "[b]ecause we hold that Mobil did not violate the ADEA" [*id.*][2] The clear message was that the case was over.

Mr. Mitchell understood this in no uncertain terms. He repeatedly acknowledged that the Tenth Circuit's decision "calls

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[2] Had the Tenth Circuit contemplated a new trial, it would not have viewed Mitchell's cross-appeal as irrelevant — as the district court noted in denying Mitchell's new-trial motion [A-16]. *E.g.*, *Carter v. Unit Rig & Equip. Co.*, 908 F.2d 1483, 1489 (10th Cir. 1990) ("since this issue may arise again on the retrial of this case, we will discuss the [cross-appeal]"); *id.* at 1486 n.4.

for total dismissal of plaintiff's claims, not merely remand for retrial . . . ." [SA-28 (motion for extension to file rehearing petition); *accord* SA-25 (Tenth Circuit had "reversed [the] judgments and ordered dismissal") (rehearing petition).]

But Mitchell's petition for rehearing did not (*i*) challenge the Tenth Circuit's authority to direct entry of judgment or (*ii*) ask for a retrial — much less offer any reason why a retrial might be appropriate.

3. **Mitchell's Third Waiver**

On June 21, 1990, Mitchell filed a motion asking the Tenth Circuit to clarify or amend the judgment to grant him a new trial. He also requested expedited consideration because, "[i]f [the Tenth Circuit] denies *the relief requested in this motion* [*i.e.*, "clarification" or "amendment"], then Mitchell desires to challenge that ruling in the Petition for Certiorari." [A-11 (emphasis added).] He made essentially the same promises in two other motions to Justice White and the Tenth Circuit. [SA-20; SA-22.]

The Tenth Circuit denied the motion to clarify or amend. Mitchell's first certiorari petition, however, never questioned the Tenth Circuit's judgment or mentioned any of his new-trial arguments — except to misrepresent that the Tenth Circuit had "refused to rule on the question" [*see* 1992 petition at 4 n.3]. The Tenth Circuit *had* ruled. It had denied the motion. *See Mitchell II* ("Mr. Mitchell raised the claims he is now asserting in his petition for rehearing [*i.e.*, his motion to clarify]. We have denied relief on those claims") [A-3].

Mitchell's deliberate failure to raise his new-trial issue in his first certiorari petition — after having promised Justice White and the Tenth Circuit three times that he would do so — constitutes yet another intentional waiver, and makes review through a second certiorari petition wholly inappropriate. *Sheet Metal Workers*, 478 U.S. at 441 ("Petitioners did not seek certiorari from this Court to review either of the Court of Appeals' judgments.

Consequently, we do not have before us any issue as to the correctness of [those earlier rulings].").[3]

B. The Tenth Circuit Properly Applied the Law of the Case.

The Tenth Circuit properly exercised its discretion in applying the law of the case, particularly in view of Mitchell's repeated waivers. The court decided in the first appeal that judgment should enter for Mobil. Mr. Mitchell twice acknowledged that fact, and the judgment became final.

The Tenth Circuit was not required to decide these issues a second time in *Mitchell II*, and was entitled to treat its earlier rulings as the law of the case.

> "[T]he doctrine [of the law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." . . . This rule of practice promotes the finality and efficiency of the judicial process by "protecting against the agitation of settled issues."

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 815-16 (1988); *accord Falcon v. General Tel. Co.*, 815 F.2d 317, 319-20 & n.5 (5th Cir. 1987) (failure to honor prior panel's decision provides incentive for losing party to "bring it back a second, or a third, or a fourth time until all the possibilities for reversal [are] exhausted").[4]

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[3] Mitchell's complaint [at 4] that the Tenth Circuit's mandate was not more specific than its opinion and judgment is frivolous. His lawyers knew (and are deemed to have known) that the mandate would consist of the Tenth Circuit's opinion and judgment along with a bill of costs. *See* Fed. R. App. P. 41(a).

[4] *See also Coal Resources v. Gulf & W. Indus., Inc.*, 865 F.2d 761, 766-67 (6th Cir. 1989) (if issue "has previously been decided in this litigation, we need not address it further"); *Gage v. General Motors Corp.*, 796 F.2d 345, 349 (10th Cir. 1986) (law of the case "is a rule based on sound public policy that litigation should come to an end . . . and is designed to bring about a quick resolution of disputes by preventing continued re-argument of issues already decided").

Mitchell's arguments to the contrary [at 13-15] all fail.

First, the assertion [at 13] that *Mitchell I* "merely reversed and remanded and did not prescribe the relief to be afforded Mobil" is flatly untenable:

(a) the Tenth Circuit held that "Mr. Mitchell produced no evidence to support [his] inference" of age discrimination [SA-14];

(b) it "reverse[d] the trial court's denial of Mobil's motion for a directed verdict" [SA-15];

(c) it did not address Mitchell's cross-appeal [*id.*];

(d) Mitchell himself correctly interpreted the court's ruling as a "total dismissal of plaintiff's claims, not merely remand for retrial" [SA-28; *accord* SA-25]; and

(e) the Tenth Circuit's decision in *Mitchell II* confirmed that *Mitchell I* had directed entry of judgment for Mobil.

Second, *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. at 817-18, is inapposite, because the judgment in that case was before this Court for the *first* time — not, as here, for a second time.

Third, *Fogel v. Chestnutt*, 688 F.2d at 109, does not hold — as Mitchell implies [at 14] — that an alleged conflict with a *prior* decision of this Court would justify disregarding the law of the case. Rather, *Fogel* and other authorities speak of departing from the law of the case where an *intervening* decision has reached a contrary and controlling conclusion. 688 F.2d at 109. There is no such decision here.

If Mr. Mitchell thought that any pre-existing authority somehow barred the outcome in *Mitchell I*, he had ample opportunity to challenge the Tenth Circuit's ruling — before it became final and the law of the case.

Mitchell II also does not conflict with any decision of this Court or of any other Circuit. None of the cases Mitchell has cited [at 7-11 & n.4] involved waiver by repeated failures to request a new trial or to challenge the appellate court's authority to direct entry of judgment for the verdict-loser.

The Tenth Circuit was therefore justified in applying the law of the case. Otherwise,

> . . . there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate of chances from changes in its members.

Roberts v. Cooper, 61 U.S. (20 How.) 529, 530 (1857).

II

This Case Does Not Present Any Nonwaivable "Jurisdictional" Issue.

Realizing that he repeatedly waived his claim for a new trial, Mitchell tries [at 11] to label the Tenth Circuit's action as "jurisdictional." This claim, too, is meritless — and in any event was conclusively decided against him in the first appeal

Mitchell's argument — based on cases under Fed. R. Civ. P. 50(b) — goes only to the particular form of relief ordered by the Tenth Circuit. It is in no way a "jurisdictional" issue.

As the Tenth Circuit correctly pointed out [A-3], it had "jurisdiction" and power under 28 U.S.C. § 2106 to reverse and render judgment for Mobil. Section 2106 authorized it to

> . . . affirm, modify, vacate, set aside or *reverse* any judgment, decree, or order of a court lawfully brought before it for review, and [to] remand the cause *and direct the entry of such appropriate judgment, decree, or order*, or require such further proceedings to be had as may be just under the circumstances. [Emphasis added.]

This "grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment *n.o.v.* on appeal." *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 322 (1967); *see also Johnson v. New York, N.H. & H. R.R. Co.*, 344 U.S. 48, 65 (1952) (Minton, J., dissenting).

The "jurisdictional" argument was also put to rest when the Tenth Circuit determined in the first appeal that it had jurisdiction to reverse with directions to enter judgment — and Mitchell failed to seek review on that issue.

A court must of course always satisfy itself of its jurisdiction. *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 740 (1976); *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382-86 (1884). "Every court in rendering a judgment, tacitly, if not expressly, determines its jurisdiction." *Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938).

In directing entry of judgment for Mobil, and then in denying Mitchell's motion to clarify or amend — which had expressly raised Mitchell's "jurisdictional" argument [A-11 to -12] — the Tenth Circuit necessarily rejected his claim and determined that its earlier opinion and judgment raised no "jurisdictional" issue. *See Mitchell II* [A-3].

Mitchell did not seek review from this Court on this ground, and he should not be allowed to reargue that question in a second appeal. *Stoll v. Gottlieb*, 305 U.S. at 172 ("After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined."); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987).

The law of the case applies to both "jurisdictional" and non-jurisdictional issues. *E.g., Trans World Airlines, Inc. v. Morales*, 949 F.2d 141, 144 (5th Cir. 1991) (applying law of the case because "arguments on this issue are substantially the same as made in the prior appeal. While the prior opinion does not explicitly

discuss it, the necessary assumption is that the prior panel found subject matter jurisdiction present."); *cf. Christianson v. Colt Indus. Operating Corp.*, 486 U.S. at 816 n.5 ("Perpetual litigation of any issue – jurisdictional or nonjurisdictional – delays, and therefore threatens to deny, justice.").

Mitchell I therefore disposed of Mitchell's "jurisdictional" argument. This claim is also meritless for at least four other reasons:

First, the Tenth Circuit's "jurisdiction" over the case derived from Article III of the Constitution and from 28 U.S.C. § 1291 – not from Rule 50(b) or any other procedural rule. The Federal Rules of Civil Procedure do not extend or limit the jurisdiction of the federal courts. Fed. R. Civ. P. 82; Fed. R. App. P. 1; *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978). Nor do they extend or limit the jurisdiction of the Courts of Appeals, to which they do not apply. Fed. R. Civ. P. 1 ("These rules govern the procedure in the United States *district courts* . . . .") (emphasis added).

Second, because jurisdiction "is an Art. III as well as a statutory requirement, . . . no action of the parties can confer subject-matter jurisdiction upon a federal court." *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). Mobil could neither confer "jurisdiction" on – nor withdraw it from – the Tenth Circuit by making or not making a motion for judgment n.o.v.

Third, even Rule 50(b)'s express requirements are not "jurisdictional" or nonwaivable. For example, although Rule 50(b) states that a party may not move for j.n.o.v. without first having moved for a directed verdict, a verdict-winner can nevertheless waive any objection to a j.n.o.v. motion that was not preceded by a directed-verdict motion, and an appellate court can review the denial of that j.n.o.v. motion. *Collins v. State of Illinois*, 830 F.2d 692, 698 (7th Cir. 1987).

This applies *a fortiori* here, because there is nothing in the actual text of Rule 50(b) that suggests that a j.n.o.v. motion (now

known as a motion for "judgment as a matter of law") is a precondition to the entry of a judgment on appeal.[5]

Fourth, Cone v. West Va. Pulp & Paper Co., 330 U.S. 212 (1947), and its progeny do not say that compliance with Rule 50(b) is a nonwaivable, "mandatory and jurisdictional" prerequisite for entering judgment on appeal in favor of the verdict-loser below [petition at 12]. None of this Court's cases holds that Mitchell's claimed restrictions on the Tenth Circuit's ability to enter judgment involve subject-matter jurisdiction, which is governed by 28 U.S.C. § 1291, or the court's remedial powers, which are conferred by 28 U.S.C. § 2106.[6]

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[5] *Collins* refutes Mitchell's claim [at 13, 6] that "[t]he issue . . . is whether Mobil irretrievably waived or surrendered *its* right to any remedy other than a retrial when it elected in January 1989 not to file post-trial motions." The plaintiff in *Collins* did not "waive" her right to move for j.n.o.v. or to seek appellate review of the evidence even though she had failed to move for a directed verdict. To the contrary, the Seventh Circuit held that it could review the evidence and the denial of the j.n.o.v. motion because the non-moving party — like Mitchell here — had not timely objected to the plaintiff's moving for j.n.o.v. without first having requested a directed verdict.

Mitchell's claim [at 13] that the lack of a j.n.o.v. motion "deprived [him] of the right to move for a new trial or nonsuit" is also wrong. There is no question but that the district court would have denied any j.n.o.v. motion Mobil might have made [A-17], and Rule 50 makes no provision for a trial court to rule conditionally on a verdict-*winner*'s right to a new trial in case of a reversal. Nor could the court have granted Mitchell a nonsuit after entry of judgment. *Williams v. Ford Motor Credit Co.*, 627 F.2d 158, 160 (8th Cir. 1980) (court may not grant post-verdict motion to dismiss without prejudice); *Western Union Tel. Co. v. Dismang*, 106 F.2d 362, 364 (10th Cir. 1939) (court "abused its discretion" in allowing voluntary dismissal after judgment).

[6] Mitchell previously had cited *Johnson v. New York, N.H. & H. R.R. Co.*, 344 U.S. 48 (1952), for the proposition that a Court of Appeals lacks "jurisdiction" to deny a verdict-winner a new trial where the verdict-loser did not move for j.n.o.v. *Johnson*, however, merely noted that 1923 Pennsylvania *state* law — which federal courts sometimes applied under the Conformity Act before the Federal Rules were adopted — had viewed the issue as one of "jurisdiction." 344 U.S. at 52 n.2.

Contrary to Mitchell's citations [at 12] dealing with notice-of-appeal requirements, Fed. R. App. P. 3 and 4 are "not jurisdictional in the sense of subject matter jurisdiction." They are "mandatory precondition[s] to the exercise of jurisdiction" and are therefore "spoken of as jurisdictional . . . in the sense that absent compliance, the court cannot acquire jurisdiction of the case, though otherwise it is a case within the court's subject matter jurisdiction," *Mann v. Lynaugh*, 840 F.2d 1194, 1197 (5th Cir. 1988).

This appeal does not involve any "preconditions" to the Tenth Circuit's acquisition of appellate jurisdiction. The "jurisdiction" discussed in *Mann v. Lynaugh* and *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), is therefore irrelevant. Mitchell also admits [at 12 n.5] that the Tenth Circuit's subject-matter jurisdiction is not at issue. It is difficult to fathom what other type of "jurisdiction" he might be talking about — or why he cannot have waived his new-trial argument, as the Tenth Circuit correctly held.

Mitchell failed on three occasions to present the question he now seeks to raise. Because his claim to a new trial in no way depends on "jurisdiction," he could and did waive it. *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. at 329-30 (new-trial request waived because "not raised in the Court of Appeals or in the petition for a writ of certiorari"); *Morlan v. United States*, 230 F.2d 30, 33 (10th Cir. 1956); *see also Dow Chem. Corp. v. Weevil-Cide Co.*, 897 F.2d 481, 486 n.4 (10th Cir. 1990) ("non-jurisdictional issues waived earlier in the proceedings may not be asserted upon remand").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 25, 1992

SUPPLEMENTAL APPENDIX

Porter H. MITCHELL,
Plaintiff-Appellee/Cross-Appellant,

v.

MOBIL OIL CORPORATION, a New York corporation;
Retirement Plan of Mobil Oil Corporation;
and Trustees of the Retirement Plan
of Mobil Oil Corporation,
Defendants-Appellants/Cross-Appellees.

Erisa Industry Committee and Association of
Private Pension and Welfare Plans, Amici Curiae.

Nos. 89-1019, 89-1031, 89-1085 and 89-1111.
United States Court of Appeals,
Tenth Circuit.
Feb. 16, 1990.

[Reported at 896 F.2d 463
58 U.S.L.W. 2500,
52 Fair Empl.Prac.Cas. (BNA) 374,
52 Empl. Prac. Dec. ¶ 39,658,
11 Employee Benefits Cas. 2633]

Before MOORE and ANDERSON, Circuit Judges, and DAUGHERTY, District Judge.*

JOHN P. MOORE, Circuit Judge.

In this case, the Mobil Oil Corporation and one of its former employees, Porter Mitchell, dispute whether changes which Mobil made in its employee benefit plan violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, and the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461. At trial, Mr. Mitchell succeeded on his age-discrimination and ERISA claims. Mobil challenges the results below, claiming that Mr. Mitchell did not meet his burden of proof on the age-discrimination claim and that he did not have standing to seek relief under ERISA. We agree with Mobil and reverse.

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* The Honorable Frederick A. Daugherty, Senior District Court Judge for the Western District of Oklahoma, sitting by designation.

I. FACTS

Until 1977, Mobil provided retirement benefits only in the form of an annuity. In 1977, Mobil added a "lump-sum option" to its retirement plan, the terms of which, for the purposes of this case, appear in the Retirement Plan of Mobil Oil Corporation as of January 1, 1984 (the Plan). Under the Plan, an employee could elect to receive a lump-sum payment which had the same equivalent actuarial value, discounted at 5%, as the annuity. In the case of early retirement, the Plan reduced the lump-sum payment by 5% for each year of retirement prior to the age of sixty. To qualify for the lump-sum option, an employee had to elect this option prior to retirement; had to be over fifty-five; and, at the date of his retirement, had to have a net worth of at least $250,000 or an accumulated lump sum in excess of $250,000.

In February 1984, Mobil amended the lump-sum option. It raised the discount rate prospectively from 5% to 9.5% and increased the eligibility threshold from $250,000 to $450,000. It also linked the new threshold to the Consumer Price Index (CPI), projecting a rise in the threshold to correlate with a rise in the CPI. These changes, however, would not take effect until at least six months after Mobil announced them, pending approval by the IRS. The delayed effective date gave employees who were eligible for the lump-sum payment under the old criteria, but who might not meet the new threshold, the opportunity to decide whether to retire and take the lump sum or to continue working and accumulating more pension benefits with the possibility that they might not accumulate sufficient additional benefits to meet the new threshold requirement at the date of their retirement.

Porter Mitchell was one of Mobil's employees who had to make such a choice. He was fifty-six at the time Mobil amended the eligibility criteria for the lump-sum option and had elected to take this option instead of the annuity. He was clearly eligible for the lump-sum option under the $250,000 threshold but was uncertain whether he would be able to meet the $450,000 threshold since it could rise, prior to his retirement, with changes

in the CPI. This choice was important to Mr. Mitchell because at the time he was making it, the market interest rate was over 9%. As a result, his lump sum, discounted at 5%, was worth approximately 140% more than his annuity.

At trial, Mr. Mitchell claimed that by forcing him to make this choice, Mobil had willfully violated the ADEA since it had, in effect, constructively discharged him because of his age. He also claimed that Mobil had breached its fiduciary duties under ERISA and that it had violated ERISA's anti-cutback provision, 29 U.S.C. § 1054(g), by retroactively limiting his right to the lump-sum option, an accrued benefit. The age-discrimination and ERISA claims were tried jointly before a jury, though, the trial court reserved for itself a decision on the ERISA claims.

The jury returned a verdict in favor of Mr. Mitchell, awarding $405,962.76 in back-pay damages; $86,000 as compensation for the 20% reduction in Mr. Mitchell's lump-sum benefit; and, $96,740.82 in front-pay damages. Because the jury found that Mobil's violation of the ADEA was willful, the trial court awarded Mr. Mitchell $405,962.76 in liquidated damages as well. The court rejected Mr. Mitchell's claim for prejudgment interest on his ADEA claim. The trial court also ruled in favor of Mr. Mitchell on his ERISA claims, awarding him $588,703.58 in compensatory damages and $405,962.76 in liquidated damages. Mobil appeals both the jury's verdict and the trial court's judgment. Mr. Mitchell cross-appeals the trial court's measure of damages.

II. THE ADEA CLAIM

A. MR. MITCHELL'S PRIMA FACIE CASE

The ADEA prohibits an employer from "discharg[ing] any individual or otherwise discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). To establish a prima facie case of age discrimination by constructive discharge, an employee must prove that his "employer by its illegal discriminatory acts has made working

conditions so difficult that a reasonable person in the employee's position would feel compelled to resign." *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 344 (10th Cir. 1986). An employee who claims that an offer of early retirement constitutes age discrimination by constructive discharge can meet this burden by demonstrating that the offer "sufficiently alters the status quo that each choice facing the employee makes him worse off" and that if he refuses the offer and decides to stay, his employer will treat him less favorably than other employees because of his age. *Bodnar v. Synpol, Inc.*, 843 F.2d 190, 193 (5th Cir.), *cert. denied*, __ U.S. __, 109 S.Ct. 260, 102 L.Ed.2d 248 (1988). An early retirement program which requires an employee to make the difficult choice between retirement with the receipt of previously unavailable incentives and continued work under the same conditions, however, does not result in constructive discharge because the employee is no worse off whichever option the employee chooses. *Henn v. Nat'l Geographic Soc'y*, 819 F.2d 824 (7th Cir.), *cert. denied*, 484 U.S. 964, 108 S.Ct. 454, 98 L.Ed.2d 394 (1987); *Schuler v. Polaroid Corp.*, 848 F.2d 276 (1st Cir. 1988).

Mobil claims that since Mr. Mitchell did not establish a prima facie case of age discrimination by constructive discharge, the trial court erred in rejecting its motion for a directed verdict on the ADEA claim. We will reverse the trial court's denial of a motion for a directed verdict only if, viewed in the light most favorable to the nonmoving party, the evidence and all reasonable inferences to be drawn therefrom point but one way, in favor of the moving party. *Zimmerman v. First Federal Sav. & Loan Ass'n*, 848 F.2d 1047, 1051 (10th Cir. 1988).

Mobil first contends that the trial court erred in denying its motion for a directed verdict because *Derr* precludes recovery for violations of the ADEA absent a showing that an employer subjected its employee to difficult or intolerable working conditions. 796 F.2d at 344. Mr. Mitchell himself admitted at trial that his working conditions were not unpleasant, that he was well regarded by his superiors, and that he enjoyed his work at Mobil. The fact that Mr. Mitchell was happy at Mobil and worked harmoniously with his colleagues and superiors, however, does not preclude a finding that Mobil's offer of early retirement

constituted age discrimination by constructive discharge. The relevant question in this case is whether Mobil's amendment of the Plan forced Mr. Mitchell, and similarly situated employees, to choose between two options both of which would leave him worse off than the status quo.

Mobil contends that it did not confront Mr. Mitchell with such a choice. Instead, it gave him an extra benefit unavailable to employees under the age of fifty-five, the choice to elect the lump-sum option at the $250,000 threshold. Mobil's argument is disingenuous. Its program, unlike that in *Henn*, 819 F.2d at 826, did not give Mr. Mitchell a choice between the receipt of a previously unavailable early retirement incentive and the continuation of work under the status quo which preceded the offer of early retirement. Instead, Mobil created a choice between two options either of which would leave Mr. Mitchell worse off than he had been prior to the change in the Plan. One choice would permit Mr. Mitchell to retire by February 1, 1985, at the age of fifty-six, and receive the lump-sum option under the old eligibility criteria. Prior to Mobil's amending the Plan, however, Mr. Mitchell could have worked until the age of sixty-five and still remain eligible for the lump-sum option under the old criteria. The other choice would permit Mr. Mitchell to continue working, but whereas prior to the Plan's amendment he could be certain to qualify for the lump-sum option, now, because Mobil had increased the threshold and linked it to the CPI, he would have to requalify for this benefit for which he had already become eligible at the age of fifty-five. Moreover, he would never be certain that he could achieve the potentially increasing threshold by retirement age.

As Mobil points out, to establish a prima facie case of age discrimination by constructive discharge, Mr. Mitchell had to prove not only that Mobil confronted him with a choice between two evils but also that Mobil would have treated him and other older employees less favorably, because of their age, had they remained on the job. Mobil asserts that since all employees were subject to the new eligibility criteria, Mr. Mitchell cannot demonstrate that the amendment of the Plan adversely affected him because of his age. Like Mr. Mitchell, employees under the age of fifty-five who had accumulated pension benefits in

excess of $250,000, but less than $450,000, or who had a net worth of between $250,000 and $450,000, also lost the opportunity to obtain the lump-sum benefit under the old criteria. Indeed, for this group of employees that opportunity was irretrievably lost, whereas Mr. Mitchell could still take advantage of it if he chose to retire prior to February 1, 1985.

Mobil's argument ignores the Plan's requirement that an employee be over the age of fifty-five before he can qualify for the lump-sum benefit. Although Mobil's employees who were under age fifty-five at the time Mobil amended the eligibility criteria might have expected to obtain the lump-sum benefit, none of them qualified for it at that time; consequently, only employees over the age of fifty-five who had already qualified to receive the lump-sum benefit, like Mr. Mitchell, would have to *requalify* for it under the new eligibility criteria if they decided to stay on the job. Since Mr. Mitchell did establish, as a matter of law, that he had been constructively discharged because of his age, the trial court properly denied Mobil's motion for a directed verdict.

B. THE JURY CHARGE ON MR. MITCHELL'S PRIMA FACIE CASE

This court will find reversible error in a trial court's jury instructions only if we have substantial doubt whether the instructions, taken together, properly guided the jury in its deliberations. *Lutz v. Weld County School Dist. No. 6*, 784 F.2d 340, 341 (10th Cir. 1986). The paradigmatic instruction on the element of intolerability in a constructive discharge case is "whether the employer by its illegal discriminatory acts has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign." *Derr*, 796 F.2d at 344. A trial court should, however, tailor this instruction to fit the facts of the case. See *Paolillo v. Dresser Indus., Inc.*, 865 F.2d 37, 40 (2d Cir. 1989).[1]

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1. Indeed, trial judges should always avoid verbatim adoption of language from appellate opinions to formulate instructions. That which is meaningful to those with a legal education is often lost upon others; therefore, a carefully crafted instruction always is tailored to fit the case in language non-lawyers will comprehend.

Mobil contends that the trial court made two errors in its constructive discharge instructions. First, the court did not require the jury to find, as stated in *Derr*, that Mr. Mitchell's working conditions were intolerable or difficult. Instead, the court instructed the jury that it could find constructive discharge by forced retirement if "a reasonable person would also have felt compelled to retire under the circumstances with which Mr. Mitchell was faced in 1984 and 1985." We have no doubt that this instruction properly guided the jury in its deliberations. An instruction patterned after the *Derr* paradigm is particularly apt in cases where an employee, who is a member of a protected class, claims that an employer forced the employee to resign by creating on-the-job conditions directed specifically at that employee. It is less suitable where, as here, an employee claims that the employer's offer of early retirement constitutes age discrimination by constructive discharge. The instruction given takes this distinction into account and is, therefore, properly tailored to the facts of the case.

Mobil also assigns as error the trial court's failure to require the jury to find a link between the choice which Mobil imposed upon Mr. Mitchell by amending the Plan and Mr. Mitchell's age. It specifically objects to the following instruction:

> [T]o take early retirement constitutes constructive discharge, one, if the decision is induced by withholding or reducing or threatening to withhold or reduce benefits from those who choose not to retire, or, two, if each choice facing the employee as a result of the change in the threshold provisions of the retirement plan leaves him worse off than before.[2]

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2. The Association of Private Pension and Welfare Plans, as *amicus curiae*, asserts that the first alternative in this jury charge would effectively outlaw voluntary early retirement programs by prohibiting employers from offering special incentives that will not be available to those who choose to remain employed. Read out of context, the jury charge does support this interpretation which would misstate the law. When the jury instructions are read as a whole, however, the trial court's reference to the "withholding or reducing or threatening to withhold or reduce benefits from those who choose not to retire" clearly addresses those situations in which the employer uses a stick, the reduction or withholding of benefits to which the employee was entitled prior to the offer of early retirement, to force employees to accept an offer of early retirement.

Mobil ignores, however, the trial court's preliminary instruction that Mr. Mitchell "must prove that Mobil's specific employment practices or policies adversely affected people in his age group at a substantially higher rate than they affected those in younger age groups." Since these instructions, taken together, properly state the law governing this case, we reject Mobil's claim that the trial court improperly instructed the jury.

C. RETROACTIVE APPLICATION OF *PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO v. BETTS*

After trial and after Mr. Mitchell filed his Reply Brief, the Supreme Court decided *Public Employees Retirement Sys. of Ohio v. Betts*, __ U.S. __, 109 S.Ct. 2854, 106 L.Ed.2d 134 (1989), which redefined the elements of a prima facie case of age discrimination based on changes in an employer's benefits plan by reinterpreting § 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2). That section exempts from liability under the ADEA any employer who "observe[s] the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of" the ADEA. Prior to *Betts*, this court and several other courts of appeal held that an employer had the burden of establishing as an affirmative defense that its early retirement program fell within the exemption of § 4(f)(2) by proving that (1) its plan was bona fide; (2) its actions were in observance of the terms of the plan; and, (3) its plan was not a subterfuge to evade the purposes of the Act. *EEOC v. Cargill, Inc.*, 855 F.2d 682, 684 n.2 (10th Cir. 1988); *EEOC v. Westinghouse Elec. Corp.*, 725 F.2d 211, 223 (3d Cir. 1983), *cert. denied*, 469 U.S. 820, 105 S.Ct. 92, 83 L.Ed.2d 38 (1984); *Karlen v. City Colleges of Chicago*, 837 F.2d 314, 318 (7th Cir.), *cert. denied*, 486 U.S. 1044, 108 S.Ct. 2038, 100 L.Ed.2d 622 (1988). An employer could disprove subterfuge by showing a cost-based justification for age-related reductions in benefits. *See Karlen*, 837 F.2d at 319; *EEOC v. City of Mt. Lebanon*, 842 F.2d 1480, 1492 (3d Cir. 1988); 29 C.F.R. § 860.120(a)(1), (d)(1)-(3) (1980), redesignated 29 C.F.R. § 1625.10(a)(1), (d)(1)-(3) (1988).

The *Betts* court implicitly overruled this prior case law. It held that § 4(f)(2) is not an affirmative defense which the employer

has the burden of proving, but rather part of the plaintiff's prima facie case. 109 S.Ct. at 2868. Under *Betts*, an employee who claims that his employer's benefits program violates the ADEA bears the burden of proving subterfuge by showing "that the discriminatory plan provision actually was intended to serve the purpose of discriminating in some nonfringe-benefit aspect of the employment relationship," such as hiring and firing or wages and salaries. *Id.* We must now determine whether, as Mobil contends, *Betts* should be retroactively applied to this case.

Our determination whether to apply *Betts* retroactively requires the weighing of three factors: (1) whether *Betts* "establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed"; (2) whether, after looking at the prior history of the *Betts* rule and at its purpose and effect, "retrospective operation will further or retard its operation"; and, (3) whether retroactive application of the *Betts* rule would be inequitable. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355-56, 30 L.Ed.2d 296 (1971) (citations omitted). Each factor need not compel prospective application. *Jones v. Consolidated Freightways Corp.*, 776 F.2d 1458, 1460 (10th Cir. 1985). Where, for example, a decision " 'could produce substantial inequitable results if applied retroactively, there is ample basis . . . for avoiding the "injustice or hardship" by a holding of nonretroactivity.' " *Chevron*, 404 U.S. at 107, 92 S.Ct. at 355 (quoting *Cipriano v. City of Houma*, 395 U.S. 701, 706, 89 S.Ct. 1897, 1900, 23 L.Ed.2d 647 (1969) (per curiam)).

Betts clearly established a new principle of law by transforming what had been an affirmative defense into an element of an employee's prima facie case. Prior to *Betts*, every circuit which addressed the applicability of § 4(f)(2) to claims of age discrimination in employee benefit programs viewed it as an affirmative defense. *Potenze v. New York Shipping Ass'n, Inc.*, 804 F.2d 235, 237 (2d Cir. 1986), *cert. denied*, 481 U.S. 1029, 107 S.Ct. 1955, 95 L.Ed.2d 528 (1987); *EEOC v. City of Mt. Lebanon*, 842 F.2d 1480, 1488 (3d Cir. 1988); *Crosland v. Charlotte Eye, Ear and Throat Hosp.*, 686 F.2d 208, 211 (4th

Cir. 1982); *Betts v. Hamilton County Bd. of Mental Retardation and Developmental Disabilities*, 848 F.2d 692, 694-95 (6th Cir. 1988), *rev'd sub nom. Public Employees Retirement Sys. of Ohio v. Betts*, __ U.S. __, 109 S.Ct. 2854, 106 L.Ed.2d 134 (1989); *Karlen v. City Colleges of Chicago*, 837 F.2d 314, 318 (7th Cir.), *cert. denied*, 486 U.S. 1044, 108 S.Ct. 2038, 100 L.Ed.2d 622 (1988); *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1395 (9th Cir. 1984); *EEOC v. Cargill, Inc.*, 855 F.2d 682, 684 (10th Cir. 1988). None even considered that § 4(f)(2) established an element of plaintiff's prima facie case. This *Chevron* factor, therefore, strongly favors nonretroactive application of *Betts*.

Retroactive application of *Betts* in this case would not further the purpose behind its new interpretation of § 4(f)(2): to exempt "the provisions of a bona fide benefit plan from the purview of the ADEA so long as the plan is not a method of discriminating in other, nonfringe-benefit aspects of the employment relationship." 109 S.Ct. at 2866. Mr. Mitchell asserts that Mobil constructively discharged him because of his age by manipulating the availability of the lump-sum benefit. In other words, Mr. Mitchell claims that Mobil used its benefit plan to discriminate against him in a nonfringe-benefit aspect of the employment relationship. His claim is exactly the type from which the *Betts* court did not intend to insulate employers. Retroactively applying *Betts*, however, would, in effect, insulate Mobil from Mr. Mitchell's claim because Mr. Mitchell did not present as part of his prima facie case evidence of Mobil's intent to use the amendment of the lump-sum provision to discriminate against him in a nonfringe-benefit aspect of the employment relationship. The second *Chevron* factor, therefore, also weighs against retroactive application of *Betts*.

Considerations of equity also undercut Mobil's contention that *Betts* should be applied retroactively. Mobil first mentioned § 4(f)(2) in its Reply Brief, filed just over two weeks after *Betts* was decided. Despite the fact that § 4(f)(2) was available to Mobil as an affirmative defense prior to *Betts*, Mobil did not plead that defense in its Answer or in its Answer to the Amended Complaint. Not surprisingly, Mr. Mitchell presented no evidence at trial on the applicability of § 4(f)(2) to his claims, nor did

Mobil. Since this case proceeded for over three years prior to Mobil's filing its Reply Brief – through discovery, trial, and initial briefing on appeal – without any mention of § 4(f)(2) as an affirmative defense for Mobil, it would work a grave injustice for us to hold that *Betts* applies retroactively.[3] This result is one which we must avoid.

D. MOBIL'S BUSINESS JUSTIFICATION AND MR. MITCHELL'S CLAIM OF PRETEXT

If an employee establishes his prima facie case of age discrimination by constructive discharge, the employer then has the opportunity to rebut the presumption of discrimination by producing evidence of a legitimate, nondiscriminatory business reason for its conduct. *EEOC v. University of Oklahoma*, 774 F.2d 999, 1002 (10th Cir. 1985), *cert. denied*, 475 U.S. 1120, 106 S.Ct. 1637, 90 L.Ed.2d 183 (1986); *Connecticut v. Teal*, 457 U.S. 440, 446-47, 102 S.Ct. 2525, 2530-31, 73 L.Ed.2d 130 (1982). To prevail, the employee must then prove that the employer's proffered justification is "a mere pretext for discrimination." *Teal*,

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3. In *Robinson v. County of Fresno*, 882 F.2d 444 (9th Cir. 1989), the Ninth Circuit applied *Betts* retroactively without resorting to the *Chevron* inquiry. In that case, Mr. Robinson, an employee of the County of Fresno, claimed that a modification to the County's retirement plan violated the ADEA because it resulted in his receiving a smaller pension than other retirees who were younger at the time of hiring. *Id.* at 445. The Ninth Circuit affirmed the district court's granting of the County's motion for summary judgment because Mr. Robinson had not established, as Betts requires, that the county intended the modification to the plan to discriminate against him in an aspect of the employment relationship unrelated to fringe benefits. *Id.* at 447.

We believe that even if the Ninth Circuit had applied the *Chevron* test, the result would have been the same. *Robinson*, nonetheless, is distinguishable from this case. Mr. Robinson did not assert, as Mr. Mitchell does, that the modification to the County's plan discriminated against him in a nonfringe-benefit aspect of the employment relationship such as hiring and firing or wages and salaries. A refusal to apply *Betts* retroactively, therefore, would have retarded the purpose behind that decision. In addition, since *Robinson* was only at the summary judgment stage at the time *Betts* was decided, applying *Betts* retroactively would not result in the high degree of injustice which retroactive application would cause in this case.

457 U.S. at 447, 102 S.Ct. at 2530. The employee can establish pretext "by showing that the employer's proffered explanation is unworthy of credence." *University of Oklahoma*, 774 F.2d at 1002.

Mobil claims that since it forwarded a legitimate business justification and Mr. Mitchell failed to prove that it was a pretext, the trial court erred in denying its motion for a directed verdict. We will reverse the trial court's denial of a motion for a directed verdict only if, viewed in the light most favorable to the nonmoving party, the evidence and all reasonable inferences to be drawn therefrom point but one way, in favor of the moving party. *Zimmerman*, 848 F.2d at 1051. Alternatively, Mobil claims that the evidence was insufficient to support the jury's finding in favor of Mr. Mitchell on this issue. We will uphold the jury's verdict unless it is clearly erroneous, or there is a lack of evidence to support it. *Colorado Coal Furnace Distribs. v. Prill Mfg.*, 605 F.2d 499, 502 (10th Cir. 1979).

At trial, Mr. Mitchell claimed that Mobil's raising the eligibility threshold for the lump sum from $250,000 to $450,000 and linking it to the CPI combined with its delaying for six months the effective date of these changes forced him to choose early retirement, resulting in age discrimination by constructive discharge. Mobil introduced evidence to justify both of these amendments to the Plan. It claimed that because inflation had eroded the real dollar value of the $250,000 threshold, which had been set in 1977, the number of employees who were eligible for, and taking advantage of, the lump-sum option had increased dramatically, creating a serious drain on Mobil's pension fund. By increasing the threshold to $450,000 and linking it to the CPI, Mobil would both restore the threshold to the equivalent of its original level in 1977 dollars and protect it from future erosion by inflation. These changes in turn would stop the drain on Mobil's pension plan resulting from the overutilization of the lump-sum option.

Mobil claimed that it delayed the effective date of these changes, rather than implementing them immediately, out of fairness to its employees. The six-month notice period would

give Mobil employees an adequate transition period to consider their choice rather than simply pulling the rug out from under them. It would also give retiring employees, who were earning their peak salaries, six months to accrue additional pension benefits since Mobil calculated these benefits based on a retiring employee's highest average salary over a period of thirty-six months.

At trial, Mr. Mitchell asserted that these justifications were unworthy of credence. He contended that Mobil amended the Plan in the manner it did to force the retirement of older Mobil employees who would become redundant as a result of an impending merger with Superior Oil Company. Mr. Mitchell asserted that Mobil needed to force these employees into early retirement to avoid large severance payments which the merger agreement required it to make to Superior employees laid off as a result of the merger. Mobil could achieve this objective only by combining an increase in the threshold with a notice period during which employees would be forced to retire early to obtain the lump-sum benefit.

Mr. Mitchell contends that several circumstances which he proved support his claim of pretext. In September 1983, mid-level Mobil executives began considering alternatives to the $250,000 threshold. In mid-December, the Mobil executive primarily responsible for changes to the Plan informed his superior — the Vice President for Employee Relations, who was also a member of the Executive Committee of Mobil's Board of Directors — that an increase in the threshold would require notice to employees and a transition plan to control the accelerated retirements of employees eligible for the lump sum. On January 9, 1984, the Executive Committee requested the Vice President for Employee Relations to continue the evaluation of an increase in the threshold and directed him to incorporate into future proposals for change a reasonable transition period between the announcement of the increased threshold and its effective date during which employees could take advantage of the old eligibility criteria.

On February 9, 1984, Mobil's Executive Committee adopted the increase in the threshold to $450,000 and linked it to the

CPI. It also decided to give employees at least six months' notice of this change so they could retire and obtain the lump sum under the old eligibility requirements. The Executive Committee recognized that the announcement of an increase in the threshold approximately six months prior to the effective date of the change would lead to the early retirement of between 1000 and 1300 employees.

One week prior to its February 9 meeting, the Executive Committee reviewed "at length"[4] the possibility of a merger with Superior and authorized Mobil's President to proceed with negotiations. Mr. Mitchell contends that because the Executive Committee reviewed the opportunity to merge with Superior at length on February 2, 1984, one can reasonably infer that the Executive Committee knew about the redundancy problem which would result from the merger prior to January 9, 1984, when it directed the Vice President for Employee Relations to incorporate a notice period into any future proposals for changes to the Plan. Mr. Mitchell produced no evidence to support this inference, however, and the record does not otherwise indicate any link between Mobil's merger with Superior and the Executive Committee's decision at its January 9 meeting to incorporate a notice period into any future changes in the Plan. In fact, the evidence points the other way since the Executive Committee adopted the transition period just one week after it authorized Mobil's President to negotiate with Superior and over one month before Mobil and Superior signed the merger agreement. The inference which Mr. Mitchell asks us to draw, therefore, is not a reasonable one, and his claim of pretext must fail. *See Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 521 (10th Cir. 1987) (quoting *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879, 895 (3d Cir.), *cert. denied*, 454 U.S. 893, 102 S.Ct. 390, 70 L.Ed.2d 208 (1981)) ("An inference is reasonable where 'there is a reasonable probability that the conclusion flows from the proven facts.' ")

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4. *See* "Excerpt from Minutes of Executive Committee Meeting held on Thursday, February 2, 1984." (Addendum to Brief of Mobil Oil Corporation, Plaintiff's Exhibit 177). The term "at length" is not defined in the minutes, and we find no other description in the record indicating the length of the review or what it entailed.

Since Mr. Mitchell did not meet his burden of production on the issue of pretext, the onerous effects of the changes in the plan notwithstanding, we reverse the trial court's denial of Mobil's motion for a directed verdict. Because we hold that Mobil did not violate the ADEA, we need not review Mr. Mitchell's cross-appeal on issues relating to the measure of damages.

III. THE ERISA CLAIMS

At trial, Mr. Mitchell claimed that Mobil's amendments to the Plan violated both § 204(g) of ERISA, 29 U.S.C. § 1054(g), which prohibits employers from reducing the accrued benefits of participants in a benefit plan, and § 510 of ERISA, 29 U.S.C. § 1140, which prohibits an employer from discriminating against a participant "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." Mr. Mitchell also claimed that Mobil breached its duty as the fiduciary of the Plan by amending the Plan in the manner that it did. After determining that Mr. Mitchell met ERISA's requirements for standing, the district court held in his favor on all of his ERISA claims and awarded him $588,703.58 in compensatory damages and $405,962.76 in liquidated damages. Mobil challenges the district court's conclusion that Mr. Mitchell had standing as well as its holdings in his favor. Since Mobil's appeal involves pure questions of law, our review of the trial court's holdings is *de novo*. *Sage v. Automation, Inc. Pension Plan and Trust*, 845 F.2d 885, 890 (10th Cir. 1988).

ERISA and its legislative history emphasize Congress's intent to provide those protected by the Act "ready access to the federal courts," 29 U.S.C. § 1001(b), and liberal remedies. *See* S. Rep. No. 127, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4838, 4871;[5] H.R. Rep. No. 533,

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5. This report of the Senate Labor and Public Welfare Committee states:

> The enforcement provisions [of ERISA] have been designed specifically to provide both the Secretary [of Labor] and *participants and beneficiaries* with broad remedies for redressing or preventing violations of the [Act]. . . . The intent of the Committee

(Footnote continued)

93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4647.[6] Although the Act has a broad remedial purpose, only participants, beneficiaries, and fiduciaries of an employee benefit plan may avail themselves of its protections. 29 U.S.C. § 1132(a). This limitation on the group of potential claimants is necessary to avoid the creation of uncertainties about an employer's obligations under ERISA and to prevent the imposition of "great costs on pension plans for no legislative purpose." *Saladino v. I.L.G.W.U. Nat'l Retirement Fund*, 754 F.2d 473, 476 (2d Cir. 1985).

ERISA defines a "participant" as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer." 29 U.S.C. § 1002(7). This definition includes "former employees who 'have . . . a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to vested benefits." *Firestone Tire and Rubber Co. v. Bruch*, __ U.S. __, 109 S.Ct. 948, 958, 103 L.Ed.2d 80 (1989) (quoting *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir.) (per curiam), *cert. denied*, 479 U.S. 916, 107 S.Ct. 318, 93 L.Ed.2d 291 (1986)). It excludes, however, former employees who have received a lump-sum payment of all their vested benefits because "these erstwhile participants have already received the full extent of their benefits and are no longer eligible to receive future payments." *Joseph v. New Orleans Electrical Pension & Retirement Plan*, 754 F.2d 628, 630 (5th Cir.),

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> is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits *due participants*.

(Emphasis added.)

6. This report of the House Committee on Education and Labor states:

> [T]he Committee recognizes the absolute need that safeguards for *plan participants* be sufficiently adequate and effective to prevent the numerous inequities to workers under plans which [inequities] have resulted in tragic hardship to so many.

(Emphasis added.)

cert. denied, 474 U.S. 1006, 106 S.Ct. 526, 88 L.Ed.2d 458 (1985). These claimants seek a damage award, not vested benefits improperly withheld. *Kuntz*, 785 F.2d at 1411. The fact that an employee takes his lump sum under protest does not preserve his standing as long as an employer properly pays out all the vested benefits owed to the employee. *Yancy v. American Petrofina, Inc.*, 768 F.2d 707, 708-09 (5th Cir. 1985).

Mobil claims that the trial court erred in granting Mr. Mitchell standing because he has never had a reasonable expectation of returning to covered employment, nor does he have a colorable claim to vested benefits. We agree. After Mr. Mitchell retired on January 1, 1985, he received all of his vested pension benefits in a single lump sum. Although he filed a protest under Mobil's internal procedures, he did not claim that Mobil had improperly withheld vested benefits. He also did not make such a claim in his complaint, nor did he seek reinstatement. Instead, he claimed that Mobil's violation of ERISA entitled him to additional benefits which he would have received had Mobil's amendments to the Plan not compelled him to retire at fifty-six, rather than sixty. Since these benefits had not yet vested, Mr. Mitchell could not have a colorable claim to vested benefits, but only a claim for compensatory damages. Furthermore, Mr. Mitchell never sought reinstatement; therefore, he also could not have a reasonable expectation of returning to covered employment. Because Mr. Mitchell failed to prove that he was still a participant in the Plan, it is inescapable that he did not have standing to seek enforcement of his ERISA claims. The trial court's holding that Mr. Mitchell is entitled to recover under ERISA, therefore, must be reversed.

For the foregoing reasons, we REVERSE the judgments of the district court.

NO. 90-297

IN THE SUPREME COURT OF THE UNITED STATES

PORTER H. MITCHELL, Petitioner,

v.

MOBIL OIL CORPORATION, a New York corporation; Retirement Plan of Mobil Oil Corporation; and Trustees of the Retirement Plan of Mobil Oil Corporation; Respondent.

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

To the Honorable Byron R. White, Associate Justice of The Supreme Court of the United States and Circuit Justice for the Tenth Circuit:

Petitioner Porter H. Mitchell, pursuant to Sup. Ct. R. 13.2, 30.2 and 30.3, prays for an extension of time in which to file his petition for certiorari in this Court. He requests twenty-one (21) calendar days from the date of the Tenth Circuit's ruling on a motion presently pending before that Court in this matter, to a maximum of sixty (60) days, to and including, September 14, 1990.

The opinion of the Tenth Circuit Court of Appeals was issued on February 16, 1990 and is published, *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463 (10th Cir. 1990). Final judgment was also entered on that same date. On March 2, 1990 Petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc which was denied by the Tenth Circuit on April 17, 1990. Therefore, Petitioner's time to petition for certiorari expires July 16, 1990. This application is being filed more than ten days before that date.

Copies of the judgment appealed from and the Order denying the petition for rehearing, are attached hereto. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)(1990 Cum.Supp.).

As shown by the documents attached, this case involved claims by Petitioner against his former employer under the Age Discrimination In Employment Act, 29 U.S.C. § 623 ("ADEA") and the Employee Retirement Income Security Act, 29 U.S.C. §§ 1054 and 1140 ("ERISA"). At trial, a jury returned a verdict in favor of Petitioner on the age discrimination claim and the trial court found in favor of Petitioner on the ERISA claims.

The Tenth Circuit Court of Appeals, however, reversed both judgments holding that the trial court erred in failing to direct a verdict against petitioner on the ADEA claim and that petitioner had no standing to assert claims under ERISA. Petitioner will seek certiorari as to both holdings on the grounds that: (a) the Tenth Circuit decided federal questions in a way conflicting with applicable decisions of the United States Supreme Court; and (b) the Tenth Circuit so far departed from the accepted and usual course of judicial proceedings in this matter as to call for an exercise of this Court's power of supervision.

On June 21, 1990, Petitioner filed a motion entitled "Motion for Clarification of the February 16, 1990 Opinion and Judgment, and Alternatively, Motion to Amend Judgment and Mandate to Expressly Order a New Trial" (copy attached). The Motion is based on an ambiguity in the Tenth Circuit's reversal, as to whether it grants Petitioner a new trial on the ADEA claim or orders the trial court to dismiss petitioner's claims without a new trial. Respondent failed to move under Fed.R.Civ. P. 50(b) for a judgment notwithstanding the verdict (j.n.o.v.) in the trial court. Clear precedent of this Court holds a court of appeals is powerless to grant a directed verdict absent filing by the verdict loser of a F.R.C.P. 50(b) motion for judgment n.o.v. Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947); Globe Liquor Co. v. San Roman, 332 U.S. 571 (1948); Johnson v. New York, New Haven & Htfd. Rd. Co., 344 U.S. 48 (1952). Mobil filed its response on June 28, 1990 (copy attached).

The purpose of this request for additional time is to avoid the necessity of petitioner filing two separate petitions for certiorari at two different times, thereby needlessly consuming resources of this Court and the parties. If the Tenth Circuit determines that Petitioner is not entitled to a new trial on his ADEA claim, despite Mobil's failure to file a motion for judgment n.o.v., then he intends to present an issue to this Court relating to such determination. The twenty-one (21) calendar days will provide petitioner sufficient time to posture and brief the issue and adjust the length of his arguments on the other issues accordingly.

WHEREFORE, Petitioner Porter H. Mitchell respectfully requests that this Court enter an order extending his time to petition for certiorari to twenty-one (21) calendar days after the date of the Tenth Circuit's ruling on petitioner's June 21, 1990 motion, to a maximum of sixty (60) days, to and including September 14, 1990 and for such other and further relief as the Court may deem proper under the circumstances.

Respectfully submitted,

PRYOR, CARNEY & JOHNSON
A Professional Corporation

By: /s/ Thomas L. Roberts
Thomas L. Roberts
6200 South Syracuse Way
Suite 400
P.O. Box 6559
Englewood, CO 80111
(303) 771-6200

July 2, 1990

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case Nos. 89-1019, 89-1031, 89-1085, and 89-1111

PORTER H. MITCHELL,

Plaintiff-Appellee/Cross-Appellant,

v.

MOBIL OIL CORPORATION, et al.,

Defendant-Appellant/Cross-Appellee.

SECOND MOTION FOR EXTENSION OF STAY OF MANDATE

COMES NOW plaintiff-appellee/cross-appellant Porter H. Mitchell and, pursuant to F.A.R. 41(b), hereby moves this Court for the continuance of his stay of mandate pending application to the United States Supreme Court for writ of certiorari, and AS GROUNDS THEREFOR, states as follows:

1. At present, Mr. Mitchell's petition for certiorari is due in the United States Supreme Court on July 16, 1990.

2. Mitchell filed a Motion for Extension of Stay of Mandate in this Court on April 24, 1990.

3. By Order dated May 8, 1990, this Court granted his Motion staying the mandate until the filing of his petition for certiorari on or before July 16, 1990, and to continue until final disposition of his case by the Supreme Court.

4. On June 21, 1990, Mitchell filed a motion with this Court seeking clarification of its February 16, 1990 opinion and judgment, or in the alternative, to amend the mandate and order a new trial. Mobil filed its response on June 28, 1990.

5. Contemporaneous with this motion, Mr. Mitchell is filing a Motion for Extension of Time to File Petition for Writ of Certiorari in the United States Supreme Court (copy attached) requesting an extension of twenty-one (21) calendar days from the date of this Court's ruling on the June 21 Motion to a maximum of sixty (60) days from July 16, 1990 (to and including September 14, 1990), which ever comes earlier.

6. As stated in the original motion for stay of mandate, in the opinion of counsel, the instant matter presents special and important reasons for issuance of a writ of certiorari and should this Court declare that the district court is ordered to enter judgment for Mobil on the ADEA claim on remand despite Mobil's failure to move for judgment notwithstanding the verdict, Mitchell desires to challenge that ruling as well in his petition for certiorari. To avoid the necessity of requesting piecemeal review of this Court's decisions, Mitchell requests further stay of the mandate corresponding with any extension of time granted by the Supreme Court.

WHEREFORE, plaintiff-appellee/cross-appellant Porter H. Mitchell, respectfully requests this Court enter its order is filed [sic] with the United States Supreme Court on or before September 14, 1990, and to continue until final disposition of the entire matter by the United States Supreme Court.

Respectfully submitted,

PRYOR, CARNEY AND JOHNSON,
a Professional Corporation

By: /s/ Thomas L. Roberts

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Rodney R. Patula, Esq.
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ATTORNEYS OF RECORD FOR
PORTER H. MITCHELL

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case Nos. 89-1019, 89-1031, 89-1085, and 89-1111

PORTER H. MITCHELL,

Plaintiff-Appellee/Cross-Appellant,

v.

MOBIL OIL CORPORATION,

Defendants-Appellants/Cross-Appellees.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC OF PORTER H. MITCHELL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

CASE NO. 86-Z-585

The Honorable Zita L. Weinshienk, Presiding

Judgement Entered January 5, 1989
After Trial to Jury (ADEA Claims)
and the Court (ERISA Claims)

Argued September 29, 1989
(before Moore and Anderson, Circuit Judges,
and Daugherty, District Judge sitting by designation)

Opinion Issued February 16, 1990
(By MOORE, J., joined by Anderson, J.,
and Daugherty, D.J.)

ATTORNEYS FOR PORTER H. MITCHELL:
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Submitted: March 9, 1990

Pursuant to Fed. R. App. P. 40(a) and 35(b) and Tenth Cir. R. 40 and 35, Porter H. Mitchell ("Mitchell") hereby petitions this Honorable Court for rehearing of this matter and suggests rehearing en banc.[1]

INTRODUCTION

Mitchell sued Mobil, his former employer, for age discrimination and violations of ERISA. In July 1984, Mobil announced that the threshold requirement employees had to satisfy to take their pension in a lump sum would be increased from $250,000 to $450,000 in accrued pension or personal net worth. The change was delayed for six months ostensibly to allow employees qualifying under the lower threshold, but not the higher one, to take the lump sum. However, they could do so only by retiring prematurely.

Since the lump sum was so much more valuable than the annuity benefit – due to discount rates and the fact that the annuity essentially disappeared upon death – Mitchell and more than 1,000 other retirement-eligible employees retired early. Mobil thus achieved what looked like a voluntary, early retirement program without spending the money for incentives which make such programs legal, saving nearly $300 million in salaries and related benefits.

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1 10th Cir. R. 35.2 Essential Allegations: I express a belief, based on a reasoned and studied professional judgment, that the panel decision of February 16, 1990 is contrary to the following decisions of the United States Supreme Court and the Tenth Circuit Court of Appeals and their progeny, and that consideration by the full Court is necessary to serve and maintain uniformity of decisions in this Circuit: *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981); *Anderson v. Bessemer City*, 470 U.S. 564, 84 L.Ed.2d 518, 105 S.Ct. 1504 (1985); *EEOC v. University of Okla.*, 774 F.2d 999 (1985), *cert. denied*, 475 U.S. 1120 (1986); *EEOC v. Prudential Fed. S & L Assoc.*, 763 F.2d 1166 (10th Cir. 1985), *cert. denied*, 474 U.S. 946 (1985); *Firestone Tire & Rubber Co. v. Bruch*, __ U.S. __, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989); *Spulak v. K-Mart*, 894 F.2d 1150 (10th Cir. 1990); *Colorado Coal Finance Dist. v. Prill Mfg.*, 605 F.2d 499 (10th Cir. 1979); *Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp.*, 571 F.2d 1144 (10th Cir. 1978), *cert. denied*, 439 U.S. 862 (1978). /s/ Thomas L. Roberts Counsel for Porter H. Mitchell.

At trial, the jury found that Mobil constructively discharged Mitchell in violation of ADEA. Also, based on internal memoranda of Mobil and the testimony of Mobil executives on cross-examination, the jury found that the ADEA violations were willful. The District Court thus awarded ADEA liquidated damages, and also found that Mobil had violated ERISA.

The panel of this Court reversed both judgments and ordered dismissal. As to ADEA, the panel held that the jury was properly instructed and that Mitchell had proved a prima facie case of constructive discharge. However, the Court ruled that Mitchell failed to prove that the "business justification" articulated by Mobil was a mere pretext for discrimination. As to ERISA, the panel held that Mitchell lacked standing to sue.

As detailed below, the business justification upon which the panel's decision is based was so discredited by cross-examination of Mobil executives that Mobil itself abandoned the theory of justification at trial. Apparently, the panel overlooked those parts of the record. Also, the panel's analysis of Mitchell's case of pretext ignores the evidence Mitchell presented in support of his prima facie case – contrary to Supreme Court and Tenth Circuit precedent. The panel assumed that Mitchell advanced at trial but one theory of pretext, perhaps because Mobil attacked only one theory on appeal. In fact, however, Mitchell showed pretext several ways, recognized by governing law as sufficient. The evidence supporting those other theories of pretext was more than adequate to sustain the jury's verdict, and in one instance, the evidence was unchallenged.

As to ERISA, the panel's decision depends upon the conclusion that Mitchell never sought reinstatement as a remedy. Yet the record shows that he expressly did so – both in his Amended Complaint and the Stipulated Pretrial Order.[2]

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2 The ground upon which the panel relied in reversing the jury's finding of willful age discrimination (that Mitchell did not meet his burden of production on the issue of pretext) was not stressed in the briefs and was not mentioned at oral argument due to the deference which appellate courts afford jury findings on appeal. There was much discussion, however, of Mitchell's

(Footnote continued)

* * *

WHEREFORE, upon the foregoing, Mitchell's Petition should be granted. The Court should vacate Sections II.D and III of its February 16, 1990 decision, and restore this cause on the docket for rehearing, by the original panel or en banc. After rehearing, the Court should issue its decision affirming the judgment entered on the jury verdict, holding that petitioner had standing to prosecute his ERISA claims and affirming the trial Court's judgment in favor of petitioner on those claims. The Court should also award petitioner the relief sought in his cross-appeal.

Respectfully submitted,

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evidence of pretext in the contexts of willfulness and Mobil's violation of fiduciary duties. Mitchell Br. at 5-12, 15-17 and 30-31; Supplemental Addendum: Statement of Briefing Corrections and Errata (filed August 30, 1989) at 5-9. Whether specifically labeled as evidence of pretext or not, Mitchell is entitled to the benefit of *all* evidence in the record to support ADEA verdict. [See, § II, infra and Supreme Court and Tenth Circuit cases there cited.]

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case Nos. 89-1019, 89-1031, 89-1085, and 89-1111

PORTER H. MITCHELL,

Plaintiff-Appellee/Cross-Appellant,

v.

MOBIL OIL CORPORATION,

Defendants-Appellants/Cross-Appellees.

STIPULATED MOTION BY PORTER H. MITCHELL FOR A FIVE BUSINESS DAY EXTENSION OF TIME TO FILE PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC OF PORTER H. MITCHELL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

CASE NO. 86-Z-585

The Honorable Zita L. Weinshienk, Presiding

Judgement Entered January 5, 1989
After Trial to Jury (ADEA Claims)
and the Court (ERISA Claims)

Argued September 29, 1989
(before Moore and Anderson, Circuit Judges,
and Daugherty, District Judge sitting by designation)

Opinion Issued February 16, 1990
(By MOORE, J., joined by Anderson, J., and Daugherty, D.J.)

ATTORNEYS FOR PORTER H. MITCHELL:
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(303) 771-6200

Filed: March 1, 1990

COMES NOW Appellee/Cross-Appellant, Porter H. Mitchell, pursuant to Local Rule 27.4 of this Court, and hereby requests an extension of time of five business days to and including Friday, March 9, 1990, within which to file his Petition for Rehearing and Suggestion for Rehearing En Banc, and AS GROUNDS THEREFOR, states as follows:

1. This Court's opinion in this matter issued on February 16, 1990, making movant's Petition for Rehearing and Suggestion for Rehearing due 14 days later on March 2, 1990.

2. Due to the President's Day holiday on Monday February 19, 1990, counsel for Mr. Mitchell did not receive and was not aware of the Court's opinion until February 20, 1990.

3. The panel's opinion reverses judgments entered on the jury's verdict on the ADEA claims and the District Court's findings on the ERISA claims and calls for total dismissal of plaintiff's claims, not merely remand for retrial, compelling plaintiff to exhaust all possible avenues of relief.

4. The bases of the panel's decision require reexamination of the entire record including voluminous trial exhibits, which cannot reasonably be done within the ordinary time allotted.

5. Due to the complexity of the legal issues and factual record which need to be distilled and presented in an extremely condensed fashion, an adequate Petition and Suggestion cannot reasonably be prepared by March 2, 1990.

6. This motion for enlargement under Rule 27.4.4. would ordinarily have been due on February 23, 1990, only three days after receipt of the opinion. This was before counsel had adequate opportunity to evaluate the need for additional time although counsel has diligently worked on the Petition and Suggestion.

7. No prior extensions have been requested, and granting this extension will not unduly delay ultimate resolution of this matter; nor is this request interposed for the mere purpose of delay.

8. This motion is unopposed. Counsel for Defendant-Appellant Mobil Oil Corporation has no objection to and has stipulated to this enlargement of time until March 9, 1990.

WHEREFORE, Porter H. Mitchell respectfully requests this Honorable Court to extend the time to and including Friday, March 9, 1990, within which to file his Petition for Rehearing and Suggestion for Rehearing En Banc and for such other relief as the Court may deem appropriate under the circumstances.

Respectfully submitted,

PRYOR, CARNEY AND JOHNSON,
a Professional Corporation

By: /s/ Thomas L. Roberts

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ATTORNEYS OF RECORD FOR
PORTER H. MITCHELL

Listing Pursuant to Sup. Ct. R. 29.1 of Mobil Oil Corporation's Parent and Non-Wholly-Owned Subsidiaries of Which Mobil Oil Corporation Owns at Least 5% (as of February 18, 1992)

MOBIL CORPORATION (PARENT)

ABRORAY PTY. LIMITED
ABU DHABI PETROLEUM COMPANY LIMITED
ACE POLYMER CO., LTD.
ADRIA WIEN PIPELINE GESMBH
AIMCO (ALPHA) SHIPPING COMPANY
AIMCO (OMEGA) SHIPPING COMPANY LTD.
AIRCRAFT FUEL SUPPLY B.V.
AIRTANKDIENST KOELN
AK CHEMIE GMBH & CO. KG
AKAUMA ASPHALT INDUSTRIES, LTD.
ALEXANDROUPOLIS PETROLEUM INSTALLATION S.A.
ALTONA PETROCHEMICAL COMPANY LIMITED
AMMENN GMBH
ANDREWS OIL PTY. LIMITED
ANKARA GAZ SATIS A.S.
ARABIAN CHEMICAL TERMINALS
ARABIAN INTERNATIONAL MARITIME COMPANY
ARABIAN INTERNATIONAL MARITIME COMPANY LIMITED
ARABIAN TRADING CO. S.A.
ARAL AKTIENGESELLSCHAFT
ATAS ANADOLU TASFIYEHANESI A.S.
ATLAS SAHARA S.A.
AUSTRALIAN SYNTHETIC RUBBER CO LIMITED
AUTOBAHN-BETRIEBE GESELLSCHAFT MBH
AVIATION FUEL SERVICES LIMITED
AYGAZ A.S.
BALGEE OIL PTY. LIMITED
BANGKOK AVIATION FUEL SERVICES LIMITED
BARRORAFT PTY. LTD
BAYERISCHE ERDGASLEITUNG GMBH
BAYERISCHE MINERAL-INDUSTRIE A.G.
BEER GMBH
BEER GMBH & CO. MINERALOEL-VERTRIEBS-KG

BIN SULAIMAN MOBIL TOWERS
BRICKWOOD HOLDINGS PTY. LTD
BUCK MINERALOELHANDEL KG
CANADIAN SUPERIOR OIL (AUST.) PTY. LTD.
CANNER'S STEAM COMPANY, INC.
CANYON REEF CARRIERS, INC.
CAS (COMBINED AUTOMATION SYSTEM) B.V.
CELMISIA SHIPPING CORPORATION
CENTRAL AFRICAN PETROLEUM REFINERIES (PRIVATE) LIMITED
CERCERA S.A.
CHANGI AIRPORT FUEL HYDRANT INSTALLATION PTE. LTD.
CHUBU TORESEN K.K.
COLLINS PIPELINE COMPANY
COLOMBIANOS DISTRIBUIDORES DE COMBUSTIBLES, S.A. "CODI"
COLONIAL PIPELINE COMPANY
COMET BRENNSTOFFDIENST GMBH
COMMERCIAL POLYMERS PTY. LIMITED
COMMODORE MARITIME COMPANY S.A.
COMPAGNIE AFRICAINE DE TRANSPORT CAMEROUN (CAT.CN)
COMPAGNIE D'ENTREPOSAGE COMMUNAUTAIRE
COMPAGNIE DES PETROLES PRIMAGAZ
COMPAGNIE SENEGALAISE DES LUBRIFIANTS
COMPANIA DE LUBRICANTES DE CHILE LIMITADA (COPEC MOBIL LTDA.)
CONSORTIUM RAYMOND DUEZ
COOK INLET PIPE LINE COMPANY
COREDIS
CORYTON COGEN LIMITED
CYPRUS PETROLEUM REFINERY LIMITED
DEPOT PETROLIER DE MOUREPIANE
DEPOT PETROLIER DU GRESIVAUDAN
DEPOTS DE PETROLE COTIERS
DEPOTS PETROLIERS DE LA CORSE (DPLC)
DEUTSCHE PENTOSIN-WERKE GMBH
DEUTSCHE TRANSALPINE OELLEITUNG GMBH
DIXIE PIPELINE COMPANY

DUKHAN SERVICES COMPANY W.L.L.
DUPONT & DEWULF N.V.
EAST TEXAS SALT WATER DISPOSAL COMPANY
ENTREPOT PETROLIER DE MULHOUSE
ENTREPOT PETROLIER DE NANCY
ENTREPRISE JEAN LEFEBVRE
ERDGAS-VERKAUFS-GESELLSCHAFT MBH
ERDOEL-RAFFINERIE NEUSTADT GMBH & CO. OHG
ERDOL-LAGERGESELLSCHAFT MBH
ESTACIONES DE SERVICIO ML, S.A.
ETABLISSEMENTS BOUTHENET
ETABLISSEMENTS JOSEPH WALLACH
ETABLISSEMENTS ROHRMANN DUFOSSE
FAIRWIND MARITIME COMPANY S.A.
FAVANG AUTOVERKSTED A/S
FELIX OIL COMPANY
FIBIL S.A.
FILTROS DE COSTA RICA, S.A.
FRUEHMESSER GMBH
FRUEHMESSER MINERALOLHANDELS GMBH & CO. KG
FUSO OPERATIONS KABUSHIKI KAISHA
GATWICK REFUELLING SERVICES LIMITED
GAZAL-GAZ ALETLERI A.S.
GEOMINES-CAEN
GEOVEXIN
GHANA BUNKERING SERVICES LIMITED
HANIEL HANDEL GMBH
HEIZOL-HANDELSGESELLSCHAFT MBH
HELLAS GAS STORAGE CO. S.A.
HIBERNIA MANAGEMENT AND DEVELOPMENT COMPANY LIMITED
HYDRANTEN-BETRIEBS-GESELLSCHAFT FLUGHAFEN/FRANKFURT
INDUSTRIA INTERAMERICANA DE FILTROS LTDA. "INTERFIL"
INTOPLANE SERVICES COMPANY LIMITED
IRANIAN OIL PARTICIPANTS LTD.
IRANIAN OIL SERVICES (HOLDINGS) LTD.
IRANIAN OIL SERVICES LIMITED
IRAQ PETROLEUM COMPANY LIMITED

IRAQ PETROLEUM PENSIONS LIMITED
ITALOIL S.R.L.
JAPAN AIRPORT FUELING SERVICE COMPANY, LTD.
JECOP
K.K. SANKYO PLASTICS
K.K. TORESEN
KANSAI PETRO-TERMINAL CO., LTD.
KANTO KYGNUS SEKIYU HAMBAI K.K.
KARL STORZ GMBH & CO. KG
KAWASAKI KYGNUS SEKIYU HAMBAI K.K.
KEIYO SEA-BERTH COMPANY, LTD.
KLAUS KOEHN GMBH
KLAUS KOEHN GMBH & CO. MINERALOEL KG
KURT AMMENN GMBH & CO. KG
KYGNUS EKKA GAS KABUSHIKI KAISHA
KYGNUS KOSAN KABUSHIKI KAISHA
KYGNUS MARKETING SERVICE K.K.
KYGNUS SEKIYU KABUSHIKI KAISHA
KYGNUS SEKIYU SEISEI KABUSHIKI KAISHA
KYOKUTO SEKIYU KOGYO KABUSHIKI KAISHA
LA CENTRAFRICAINE DES PETROLES
LILAC SEKIYU K.K.
LIPET-LIKIT PETROL GAZI VE YAKIT TICARET A.S.
LUBLEND LIMITED
LUBRICANTES DEL SUR, S.A.
MARCEAUX & CIE
MATCO TANKERS (U.K.) LIMITED
MEENTZEN & FRANKE GMBH & CO.
MERTL GMBH
MID STATE PETROLEUM PTY. LIMITED
MINERALOEL-HANDELS-GESELLSCHAFT MBH
MINERALOELWERK WEDEL GMBH & CO. OHG
MOBIL CATALYSTS CORPORATION OF JAPAN
MOBIL KOREA LUBE OIL, INC.
MOBIL MARKETING BARBADOS COMPANY LIMITED
MOBIL MOTOR REST S.A.
MOBIL OIL - AFOR KERESKEDELMI KFT.
MOBIL OIL BARBADOS LIMITED
MOBIL OIL DE MEXICO, S.A. DE C.V.
MOBIL OIL DJIBOUTI

MOBIL OIL FRANCAISE
MOBIL OIL GABON
MOBIL OIL GHANA LIMITED
MOBIL OIL MAROC
MOBIL OIL NIGERIA PUBLIC LIMITED COMPANY
MOBIL OIL PORTUGUESA S.A.
MOBIL PRODUCING CAMEROON INC.
MOBILGAZ MOBIL PETROL GAZLARI A.S.
MOGESTE-GESTAO DE POSTOS DE ABASTECIMENTO LDA.
MOTEL REST S.A.
MT. MARROW BLUE METAL QUARRIES PTY. LIMITED
MULTI TANK CARD B.V.
N.V. ROTTERDAM-RIJN PIJPLEIDING MAATSCHAPPIJ
N.V. SOCONY-STANDARD-VACUUM OIL COMPANY (PETROLEUM MAATSCHAPPIJ)
NAKAJIMA KOSAN KABUSHIKI KAISHA
NEAR EAST DEVELOPMENT CORPORATION
NEW ZEALAND SYNTHETIC FUELS (HOUSING) CORPORATION LIMITED
NEW ZEALAND SYNTHETIC FUELS CORPORATION LIMITED
NICHIMO OIL (BERMUDA) CO., LTD.
NIPPON UNICAR COMPANY, LIMITED
NORDDEUTSCHE ERDGAS-AUFBEREITUNGS-GESELLSCHAFT MBH
NORVAC PTY. LIMITED
OCTAGON PTY. LTD.
OLDENBURGISCHE ERDOEL GESELLSCHAFT MBH
OLJEFORSYNING OFAS A.S.
OSAKA KYGNUS K.K.
OVENS & MURRAY PETROLEUM PTY. LTD.
P.T. ARUN NATURAL GAS LIQUEFACTION COMPANY
P.T. STANVAC INDONESIA
PALOMA PIPE LINE COMPANY
PARS INVESTMENT CORPORATION (PRIVATE COMPANY)
PAUL HARLING MINERALOEL GMBH & CO. KG
PEACE PIPE LINE LTD.
PERKAL PTY. LIMITED
PETROCAB

PETROCAM PTY. LIMITED
PETROGAS PROCESSING LTD.
PETROLEUM SERVICES (MIDDLE EAST) LIMITED
PETROMIN LUBRICATING OIL COMPANY
PETROMIN LUBRICATING OIL REFINING COMPANY
PETROMIN-MOBIL YANBU REFINERY COMPANY LTD.
PIONEER KOSAN K.K.
PLEGADIZOS PARA LA INDUSTRIA S.A.
PRESNALL PTY. LIMITED
PROGAS LIMITED
PROVIDANGE
P6-GROEP B.V.
R. SHERWOOD LIMITED
RACOON S.R.L.
RAINBOW PIPE LINE COMPANY LTD.
RED SEA PLASTIC FACTORY COMPANY LIMITED
REGULUS HOLDING (SINGAPORE) PTE. LTD.
RHODES PETROLEUM INSTALLATION S.A.
ROHOL-AUFSUCHUNGS GESELLSCHAFT MBH
RUHRGAS AKTIENGESELLSCHAFT
RUNDEL MINERALOELVERTRIEB GMBH
S.C. BRUSSELS AIRFUELS SERVICES C.V.
SABA-SOCIEDADE ABASTECEDORA DE AERONAVES LDA.
SARL ETABLISSEMENTS MICHEL FAURE
SAUDI MARITIME COMPANY LTD.
SAUDI YANBU PETROCHEMICAL CO.
SAWYER PETROLEUM PTY. LTD.
SCHUBERT KOMMANDITGESELLSCHAFT
SEGHER DE MEXICO, S.A. DE C.V.
SIERRA LEONE PETROLEUM REFINING COMPANY LIMITED
SIGEL INCORPORATED
SOCIETA' ITALIANA PER L'OLEODOTTO TRANSALPINO - SIOT S.P.A.
SOCIETE "LES FILS DE FERRERO"
SOCIETE AFRICAINE DE RAFFINAGE (S.A.R.)
SOCIETE ANONYME DE GESTION DES STOCKS DE SECURITE
SOCIETE BELGE DE TRANSPORT PAR PIPELINE S.A.

SOCIETE CAMEROUNAISE DE DEPOTS PETROLIERS (S.C.D.P.)
SOCIETE COLMARIENNE DE DISTRIBUTION DE PRODUITS PETROLIERS
SOCIETE COMBUSTIBLES DE PROVENCE
SOCIETE D'ENTREPOSAGE DE GABES
SOCIETE D'ENTREPOSAGE DE SAN PEDRO
SOCIETE D'ENTREPOSAGE PETROLIER AU BURUNDI (SEP BURUNDI)
SOCIETE DE CONSTRUCTION & DE GESTION CB.12
SOCIETE DE GESTION DE DEPOTS D'HYDROCARBURES
SOCIETE DE GESTION DES STOCKS PETROLIERS DE COTE D'IVOIRE (GESTOCI)
SOCIETE DE MANUTENTION CARBURANTS AVIATION DE TAHITI (SOMCAT)
SOCIETE DE MANUTENTION DE CARBURANTS AVIATION (S.M.C.A.)
SOCIETE DE MANUTENTION DE CARBURANTS AVIATION DAKAR-OFF
SOCIETE GABONAISE D'ENTREPOSAGE DE PRODUITS PETROLIERS
SOCIETE GABONAISE DE RAFFINAGE
SOCIETE IVOIRIENNE DE FABRICATION DE LUBRIFIANTS (S.I.F.A.L.)
SOCIETE IVOIRIENNE DE RAFFINAGE
SOCIETE MALIENNE D'ENTREPOSAGE (S.M.E.)
SOCIETE MAURITANIENNE D'ENTREPOSAGE DE PRODUITS PETROLIERS
SOCIETE NATIONALE DE RAFFINAGE
SOCIETE PIZO DE FORMULATION DE LUBRIFIANTS
SOCIETE STATION-SERVICE LUNES
SOCIETE TAHITIENNE DE DEPOTS PETROLIERS
SOCIETE TAHITIENNE DES OLEODUCS (STDO)
SOCIETE TCHADIENNE D'ENTREPOSAGE DE PRODUITS PETROLIERS
SOCIETE TOGOLAISE D'ENTREPOSAGE
SOCIETE WALLISIENNE ET FUTUNIENNE D'ENTREPOSAGE DE PRODUITS PETROLIERS
SOCIETE ZAIROISE D'EMBALLAGE
SOUTH SASKATCHEWAN PIPE LINE COMPANY

STATFJORD TRANSPORT A.S.
STE CAMEROUNAISE EQUATORIALE DE FABRICATION DE LUBRIFIANTS (S.C.E.F.L.)
STE DES-BITUMES & CUT-BACKS DU CAMEROUN (S.B.C.B.C.)
STRASBURGER ENTERPRISES (PROPERTIES) PTY. LIMITED
SUN EAST COMPANY LIMITED
SUPERIOR DISK CORPORATION
SYDNEY METROPOLITAN PIPELINE PTY. LIMITED
T&M TERMINAL COMPANY
TANKBAU-GMBH
TANKLAGERGESELLSCHAFT KOELN-BONN
TAR TANKANLAGE RUEMLANG A.G.
TECKLENBURG GMBH
TECKLENBURG GMBH & CO. ENERGIEBEDARF KG
TEMA LUBE OIL COMPANY LIMITED
TGF TANKDIENST-GESELLSCHAFT FRANKFURT
THAILAND SOLVENT PRODUCTS LIMITED
THE ARABIAN ENERGY COMPANY LIMITED
THE ARABIAN PETROLEUM SUPPLY CO. (S.A.)
THE NEW ZEALAND REFINING COMPANY LIMITED
THE SAUDI CAN COMPANY LTD.
TOHPREN CO. LTD.
TOKUSHIMA SEKIYU KABUSHIKI KAISHA
TONEN CHEMICAL CORPORATION
TONEN CORPORATION
TONEN ENERGY AND MARINE (SINGAPORE) PTE. LTD.
TONEN ENERGY INTERNATIONAL CORPORATION
TONEN FILARE CO., LTD.
TONEN FILM CO., LTD.
TONEN PROPERTIES INC.
TONEN SOGO SERVICE CO. LTD.
TONEN SYSTEM PLAZA INC.
TONEN SYSTEM SERVICE INC.
TONEN TANKER KABUSHIKI KAISHA
TONEN TAPYRUS COMPANY LIMITED
TONEN TECHNOLOGY KABUSHIKI KAISHA
TONEX COMPANY LIMITED
TOWA COMPOUNDING COMPANY LIMITED

TOYOSHINA FILM COMPANY LIMITED
TRADEWIND MARITIME CO. S.A.
TRANSALPINE OELLEITUNG IN OESTERREICH
GESELLSCHAFT MBH
TRESKOME PTY. LIMITED
TRYICE PTY. LIMITED
TULLIA 89 S.R.L.
TURKISH PETROLEUM COMPANY LIMITED
TWIFO OIL PALM PLANTATIONS LIMITED
UBAG UNTERFLUR-BETANKUNGSANLAGE A.G.
UNITED KINGDOM OIL PIPELINES LIMITED
W.A.G. PIPELINE PTY. LIMITED
WAITOMO/BRENAN PETROLEUM LIMITED W/BP
WAKO JUSHI KABUSHIKI KAISHA
WALTON-GATWICK PIPELINE COMPANY LIMITED
WERNER WEIDEMANN MINERALOELVERTRIEB GMBH
WEST LONDON PIPELINE AND STORAGE LIMITED
WEST SHORE PIPE LINE COMPANY
WILHELM MERTL GMBH & CO. KG
WIRI OIL SERVICES LIMITED
WOLVERINE PIPE LINE COMPANY
WYMONDHAM OIL STORAGE CO. LIMITED
ZAIRE MOBIL OIL S.A.R.L.
ZAIRE S.E.P.